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No. 04-908

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, Warden, *Petitioner,*

v.

CLIFTON MAXWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY MEMORANDUM

In his opposing brief, Respondent, Clifton Maxwell, puts forth three reasons why this Court should not grant Petitioner Warden Michael Yarborough's petition for writ of certiorari. None of those reasons have merit.

I.

BECAUSE OF THE IRREPARABLE HARM WHICH WILL ENSUE IF THE DISTRICT COURT IS REQUIRED TO COMPLY WITH THE NINTH CIRCUIT'S REMAND FOR A "FULL EVIDENTIARY HEARING," THE ISSUE PRESENTED IN THIS CASE IS RIPE FOR REVIEW

Respondent asserts that the October 22, 2004, amended decision of the Ninth Circuit in Case No. 02-55143, is not a final judgment and therefore the Ninth Circuit's holding--that a federal habeas corpus petitioner who claims he was incompetent to stand trial in state court and seeks a federal evidentiary

hearing on the competency claim is excused from meeting the requirements of 28 U.S.C. § 2254(e)(2)(A), which strictly limit the availability of such hearings–is not ripe for review. Brief in Opp. at 3. In so doing, Respondent relies on civil cases having no bearing on the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and ignores the fact that without intervention by this Court the district court will be required to initiate pre-hearing proceedings, set discovery and motion dates, determine the parameters of permissible discovery, and hold motion and other in limine hearings, all culminating in a needless "full evidentiary hearing."

"For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, no abstractions,' are requisite." *United Public Workers of America (C.I.O.) et al v. Mitchell, et. al*, 330 U.S. 75, 89 (1947). The question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship on the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967).

The issue in this case is not simply an "abstract disagreement." *Abbott Laboratories*, 387 U.S. at 148. The impact of the Ninth Circuit's remand for a full evidentiary hearing is "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152. A contrary finding would (1) permit the Ninth Circuit to circumvent the mandated requirements of 28 U.S.C. § 2254(e)(2)(A), which strictly limit the availability of evidentiary hearings to a federal habeas corpus petitioner, (2) require the district court to hold an evidentiary hearing despite no judicial finding that Respondent has met those strict requirements, and (3) cause direct and immediate harm in the expenditure of scarce and expensive judicial resources in holding an evidentiary hearing in a collateral proceeding attacking a state court judgment. While Respondent suggests that Petitioner could seek review of the issue in this case after an evidentiary

hearing is held (Brief in Opp. at 4), the holding the evidentiary hearing would defeat the very reason certiorari should be granted at this time; to prevent the district court from having to hold such an inappropriate hearing resulting in a legally unsupportable expansion of the trial court record. Review of the issue at that later time would countenance the harm wrought by the Ninth Circuit's amended decision and is contrary to the well-established principles of ripeness and justiciability.

II.

IF RESPONDENT DEVELOPED THE RECORD IN THE TRIAL COURT, THEN THE REPORTER'S AND CLERK'S TRANSCRIPT OF THE STATE TRIAL COURT PROCEEDING EVINCE THAT RECORD; A FULL EVIDENTIARY HEARING IS NOT PERMITTED TO ENLARGE THAT RECORD WITH EVIDENCE THAT WAS NOT CONSIDERED BY THE TRIAL COURT

Respondent further opposes a grant of certiorari, arguing that he "did develop a record in the trial court and that court made certain factual findings and conclusions regarding the competency issue." Brief in Opp. at 5. He maintains the Ninth Circuit's remand to the district court for an evidentiary hearing merely seeks to clarify what evidence was before the trial court. "Otherwise, it would be impossible for the district court, or any other court [to] conduct an informed review of the trial court's decision." Brief in Opp. at 6.

First, if Respondent developed the record in the trial court, then the record is as it appears in the reporter's and clerk's transcripts of the trial court proceedings. The Ninth Circuit's decision, however, does not merely seek clarification of the existing record; it orders the district court to consider both "the facts established in the record and the facts a 'more complete inquiry' by the trial court could have revealed," and "to consider

the reasonableness of the trial court's determination that Maxwell was competent to stand trial in light of those facts." Pet. for Certiorari, Appendix A at 3a, 6a, emphasis added.

Second, that record is not unclear: the California Court of Appeal, the California Supreme Court, and the United States District Court for the Central District of California all were able to conduct an "informed review of the trial court's decision" based on the record as contained in the reporter's and clerk's transcripts of the trial court proceedings. The district court was able to apply the presumption of correctness to the factual findings of the state trial court in conducting its deferential analysis under AEDPA. If during the trial court proceedings Respondent introduced evidence to establish his incompetency to stand trial that was not made part of the record, or if he was precluded from introducing such evidence, Respondent should have sought the inclusion of such evidence at the time of trial or alleged in state and federal habeas corpus proceedings that trial defense counsel was constitutionally ineffective in failing to do so. *See Koste v. Dormire,* 345 F.3d 974, 985-86 (8th Cir. 2003) (habeas petitioner not entitled to evidentiary hearing on claim that trial counsel was ineffective in failing to request psychiatric evaluation of petitioner; any inadequacy in state court record was largely attributable to petitioner). Throughout direct review of his conviction in state court, and collateral habeas corpus review in state and federal courts, Respondent has continuously declined to do so, thus precluding Petitioner and every court that has considered Respondent's incompetency claim from hearing relevant evidence from defense counsel who "will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California,* 505 U.S. 437, 450 (1992). Under these circumstances, the effect of the Ninth Circuit's decision is to permit Respondent to inappropriately expand the record that was before the trial court when the trial court determined Respondent was competent to stand trial, while disregarding trial defense counsel's repeated

proclamations that he was not requesting a competency hearing and had no doubt that Respondent was competent to stand trial (1 RT 80-81; 5 RT 840), and without requiring Respondent to meet the strict evidentiary hearing requirements set forth in 28 U.S.C. § 2254(e)(2)(A).

III.

CERTIORARI SHOULD BE GRANTED TO PREVENT THE NINTH CIRCUIT FROM ISSUING UNPUBLISHED DECISIONS AS A MEANS TO CONTINUE AVOIDING THE RULINGS OF THIS COURT AND THE REQUIREMENTS OF AEDPA

Lastly, Respondent suggests this Court should not grant certiorari in this case because the Ninth Circuit's decision is unpublished, and thus has not created a conflict amongst the circuits. Brief in Opp. at 7. Unless certiorari is granted, the unpublished nature of the Ninth Circuit's amended decision will permit the Ninth Circuit to create with impunity a categorical exception to the evidentiary hearing requirements of 28 U.S.C. § 2254(e)(2)(A) for federal habeas petitioners who claim they were incompetent to stand trial, in direct conflict with the mandates of AEDPA as well as the decisions of this Court.

The Ninth Circuit's attempt to carve out an exception to the evidentiary hearing requirements of AEDPA by announcing the exception in an unpublished amended decision should not be condoned. Regardless of the unpublished nature of the amended decision, it will cause irreparable harm to the State in defending its state court judgments by permitting the Ninth Circuit to carve out its own exceptions affording needless evidentiary hearings, thus depriving the state court factual findings the presumption of correctness and the resulting judgments the deference to which they are entitled. 28 U.S.C. § 2254(d) & (e)(1). This Court should not permit the Ninth Circuit's amended decision to create a conflict with other

circuits which have required adherence to 28 U.S.C. § 2254(e)(2)(A)'s evidentiary hearing requirements when confronted with requests for evidentiary hearings on competency to stand trial claims. *See, i.e., Roberts v. Dretke,* 381 F.3d 491, 494 (5th Cir. 2004); *Valdez v. Ward,* 219 F.3d 1222, 1229, 1239-40 (10th Cir. 2000); *see also Koste v. Dormire,* 345 F.3d at 985-86.

This Court's supervisory power is again needed because of the Ninth Circuit's failure to adhere to AEDPA's strict limitations on the scope of its collateral review of state court constitutional adjudications. *See* Sup. Ct. R.10(a); *see also Middleton v. McNeil*, 541 U.S. 433, 437-39 (2004) (*per curiam*), *rev'g* 344 F.3d 988 (9th Cir. 2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*), *rev'g Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002); *Woodford v. Visciotti*, 537 U.S. 19, 26-27 (2002) (*per curiam*), *rev'g* 288 F.3d 1097 (9th Cir. 2002); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*) *rev'g Packer v. Hill*, 291 F.3d 569 (9th Cir. 2002).

CONCLUSION

For these reasons, Petitioner, Warden Michael Yarborough, respectfully requests a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Dated: May 5, 2005

Respectfully submitted,

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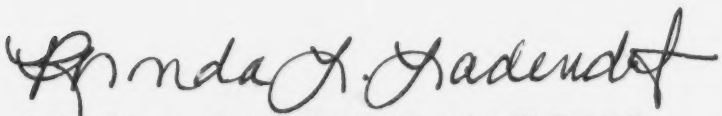

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